

**PERCY D. STILES**  
Claimant  
VS.  
**BEECH AIRCRAFT**  
Respondent  
AND  
**SELF INSURED**  
Insurance Carrier

## ISSUES

- (1) Whether claimant is permanently totally disabled as a result of an injury occurring on January 21, 1982.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant has failed in his burden of proving that he is permanently totally disabled as a result of an injury on January 21, 1982.

Claimant, an electrician for Beech aircraft, fell off of a ladder in 1982 injuring his back and legs. As a result of that injury, he was found to be one-hundred percent (100%) permanently partially disabled and awarded \$75,000.00. Claimant was paid at the rate of \$173.00 per week from the date of the injury until July 1991 at which time the \$75,000 maximum award was paid out.

Claimant alleges at this time that he is permanently totally disabled and entitled to an additional \$25,000.00 for the injury. Claimant, a fifty-eight (58) year old high-school dropout, obtained his GED while in the Army. He was trained as a smelter and an electrician, with preliminary training from residential electrical work and more formal training being obtained while employed with the respondent, Beech Aircraft. Subsequent to his 1982 injury claimant has not worked. He was awarded Social Security Disability benefits in 1984 and remains on same at the time of this Award.

Subsequent to his motion for additional compensation and at his attorney's request, claimant was examined by Dr. Ernest Schlachter on March 24, 1992. Dr. Schlachter diagnosed chronic obstructive pulmonary disease, asthma, spinal stenosis and spinal arthritis. He restricted claimant from doing manual labor but found that claimant was capable of doing labor in the light and sedentary categories of the *Dictionary of Occupational Titles*. During Dr. Schlachter's examination he found no muscle weakness in the lower extremities, the thighs and calves were normal in circumference, leg length was equal, vibratory sensation bilaterally was normal, there were no sensory defects, and the claimant was able to lie on his back and flex his thighs without pain. The straight leg, Lasegue's, Patrick's, and Faber's tests were all normal or negative. Claimant walked without a limp, heel and toe walked without difficulty, and was capable of doing a deep-knee bend, getting down on each knee, and getting down on all fours. Dr. Schlachter felt claimant could lift ten (10) pounds repetitively, twenty (20) pounds on a single lift, with limited bending, sitting, standing, and working in awkward positions. Claimant was capable of doing general maintenance and light electrical work around the house and on his vehicles.

Claimant was also examined by Dr. Lawrence Blaty, a board-certified physical medicine and rehabilitation specialist. Dr. Blaty found claimant to walk very slowly and in a bent forward position. He found muscle spasms over the lumbar spine, only twenty (20) degrees of forward flexion and twenty (20) degrees lateral bend, a positive straight leg test on the right side, and he observed significant difficulty when claimant attempted to kneel or get into a squatting position neither of which he was able to accomplish during the exam. These physical findings are inconsistent with the findings of Dr. Schlachter's examination.

Dr. Blaty diagnosed spinal stenosis and lumbar spondylosis and status post-lumbar decompression laminectomy and fusion. He felt claimant would be incapable of working

a full eight-hour day. When asked about the definite variation between his examination and Dr. Schlachter's, Dr. Blaty agreed that under the *AMA Guides* a deviation for forward flexion of greater than five to ten (5-10) degrees would be an abnormal finding. He also felt it abnormal for a person to be able to kneel at one examination and be unable to do the same at another examination.

Claimant was also examined by Dr. Forney Fleming, a board-certified orthopedic surgeon. Dr. Fleming diagnosed a failed back syndrome which, while not being a specific medical diagnosis, refers to a person who has multiple problems referable to his back, has undergone surgical procedures in the past, with the net result being significant pain, discomfort and limitation of motion. Dr. Fleming felt Mr. Stiles was almost totally disabled and could only work a limited number of hours per day, i.e. as few as two (2) hours per day. Claimant was restricted in his ability to stand for more than thirty to forty-five (30-45) minutes or walk more than thirty (30) minutes at a time.

During the regular hearing in this matter, claimant testified he suffers from bilateral leg weakness, inability to bend, and limited standing of maximum thirty (30) minutes at a time. Claimant denied doing any yard work or auto mechanic work, although he did admit to changing the air filter on one of his vehicles.

The respondent deposed Mr. Gary Weimholt, a vocational rehabilitation consultant qualified by the State Workers Compensation Division as a rehabilitation consultant. Mr. Weimholt does vocational rehabilitation opinions for the Department of Health, Education and Welfare and Social Security, is certified by the United States Department of Labor Office of Workers Compensation as a vocational rehabilitation counselor for injured federal employees or longshoremen under the Longshoremen's Act, and is a certified vocational rehabilitation counselor for the Union Pacific Railroad and the Department of Veteran's Affairs. Mr. Weimholt found Dr. Schlachter's opinion to be more detailed and specific than that of the other doctors who testified, but did feel that their opinions were basically consistent in that the claimant could perform some types of work either in the sedentary or light physical categories. He provided a list of one-hundred thirty (130) jobs he felt the claimant was capable of doing in the Wichita area, but admitted that if the claimant could only work two to three (2-3) hours per day most of the jobs on his list would be eliminated. His assumption was that this gentleman would be capable of doing these one-hundred thirty plus (130+) jobs on an entry-level basis eight (8) hours per day. Dr. Schlachter opined claimant was physically capable of working in the light or sedentary category for eight (8) hours per day.

The claimant deposed Mr. Jerry Hardin who opined claimant's ability to perform work in the open labor market and to earn a comparable wage had been reduced one-hundred percent (100%) due to the injuries sustained. Mr. Hardin opined based upon the restrictions of Dr. Fleming and Dr. Blaty that claimant was incapable of doing any type of manual labor and was further restricted to two to three (2-3) hours per day working. He felt this effectively took claimant out of the labor market. He refused to provide an opinion regarding claimant's loss of access to the open labor market or ability to earn a comparable wage if claimant were limited to part-time work. Mr. Hardin was provided with the transcript of Dr. Fleming's deposition, but not that of Dr. Schlachter.

The respondent also placed into evidence a video tape taken by Mr. Anthony Darr of ASET Corporation, an investigative firm hired to investigate the claimant. The video tape contained over two (2) hours of film showing the claimant working over, under, and around the vehicles in his yard. Claimant was seen squatting, kneeling, and lying on his stomach peering underneath the car. He was also seen for periods of time bending over

the hood of the car performing some type of auto mechanic's work. The physical activities displayed by the claimant on the video tape contradicted not only his testimony but the findings of Dr. Fleming and Dr. Blaty.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"Burden of proof means the burden of a party to persuade the trier of facts by preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award of compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own decision. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

K.S.A. 44-510c(a)(2) states:

"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

As indicated above, it is the claimant's burden to prove his entitlement to an award, in this case permanent total disability. A review of the facts shows significant contradiction between claimant's allegations as to what he can or cannot physically do and that which is portrayed on the video tape. The testimonies of Dr. Blaty and Dr. Fleming appear to be contradicted by the video tape in that claimant accomplishes physical feats on the film which he was unable to perform during their examinations. The examination performed by Dr. Schlachter appears to be more consistent with the physical abilities exhibited by the claimant and as such the Appeals Board finds Dr. Schlachter's opinion to be more credible and accurate in assessing claimant's abilities and limitations.

The Appeals Board finds that the evidence taken as a whole and the medical testimony of Dr. Schlachter establish that claimant is physically capable of performing jobs

in the light and sedentary categories of the *Dictionary of Occupational Titles*. The claimant has failed to prove that he is permanently totally disabled at this time.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 19, 1994, denying claimant permanent total disability against the respondent, Beech Aircraft Corporation, self-insured, for the accidental injury occurring on January 21, 1982, is affirmed in all respects.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$ 150.00
Barber & Associates	
Transcript of Regular Hearing	\$ 219.90
Deposition of Ernest Schlachter, M.D.	175.80
Deposition of Gary Weimholt	184.40
Deposition of Ernest Schlachter, M.D.	126.00
Deposition of Lawrence Blaty, M.D.	158.80
Deposition of Anthony Darr	110.50
<b>Total</b>	<b>\$ 975.40</b>
Ireland Court Reporting	
Deposition of Forney Fleming, M.D.	\$ 131.10
Deposition of Jerry Hardin	234.50
<b>Total</b>	<b>\$ 365.60</b>

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, 1009 S Broadway, Wichita, KS 67211  
Terry J. Torline, 300 Page Ct, 220 W Douglas, Wichita, KS 67202  
William F. Morrissey, Special Administrative Law Judge

**PERCY D. STILES**

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**DOCKET NO. 158,038**

George Gomez, Director